BEFORE THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA

SUTTER HEALTH CENTRAL VALLEY REGION d/b/a SUTTER TRACY COMMUNITY HOSPITAL, Respondent and Employer, and CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED, CNA/NNU, Charging Party and Union.	Case No.: 32-CA-098549

REPLY BRIEF SUBMITTED BY RESPONDENT SUTTER CENTRAL VALLEY HOSPITALS d/b/a/ SUTTER TRACY COMMUNITY HOSPITAL IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

In its Exceptions and Supporting Memorandum, Respondent Sutter Health Central Valley Region d/b/a Sutter Tracy Community Hospital ("the Hospital") demonstrated that it lawfully implemented proposed changes to its health benefits and wellness plan pursuant to an annually occurring past practice. In that brief, the Hospital made clear that both the facts and the law show that it at all times bargained in good faith, that it did not present to the Union a *fait accompli*, and that it met its obligation to provide the Union with notice and a meaningful opportunity to bargain over the proposed changes. In particular, the Hospital demonstrated that, as a matter of law, it did not present a *fait accompli* simply because it stated its perfectly lawful (and common-sense) desire to maintain the same benefit plan for both union and non-union employees. Nor was it a *fait accompli* for the Hospital to exercise its Section 8(c) rights and communicate its proposal to employees — *after* presenting the proposal to the Union, and all the while making it clear that the proposal needed to be the subject of bargaining. Indeed, the Administrative Law Judge's Decision and Recommended Order ("ALJD") reached contrary conclusions only because it ignored and misstated undisputed record evidence while relying on an utterly flawed legal analysis.

Both the General Counsel and the Union sidestep the key legal and factual errors in the ALJD and instead attempt to argue that, *fait accompli* or not, the Hospital's conduct is somehow distinguishable from the health plan changes upheld in a series of Board cases. *See St. Mary's Hosp. of Blue Springs*, 346 NLRB 776 (2006) and *Saint-Gobain Abrasives, Inc.* 343 NLRB 542 (2004) (citing *Stone Container Corp.*, 313 NLRB 336 (1993)).

In truth, the distinctions offered by the Union and the General Counsel are wholly unconvincing and would, instead, limit applicable case law to its facts and effectively overrule precedent that many employers — including the Hospital — have relied upon when negotiating first contracts with unions. Contrary to what the Union and General Counsel would have the Board believe, this case is not about the minute distinctions between the facts at hand and the facts of *Stone Container* and its progeny, which in any event are far more similar to this case than not. What this case is about is whether the Hospital met its legal obligation to provide the Union with notice and a reasonable opportunity to bargain. It did, and thereafter it was the Union's obligation — not the Hospital's — to make the most of its opportunity. The Union failed to seize on that opportunity, however. After that, the Hospital was permitted by law to implement changes to its health benefits and wellness plan in accordance with its annual practice.

For these reasons, and for the reasons stated more fully below and in the Hospital's Exceptions and Supporting Memorandum ("Exceptions"), the ALJD must be reversed and the Union's complaint must be dismissed in its entirety.

II. ARGUMENT

A. The Union And General Counsel Seek To Overturn The Prevailing Law Concerning Notice And Opportunity To Bargain.

In their Answering Briefs,[1] the Union and General Counsel inaccurately assert that the *Stone Container* exception does not apply under the facts of this case because the Hospital offered only a *fait accompli*, thus relieving the Union of its obligation to bargain. (Un. Br. at 15;

[1] The Union's Answering Brief is cited as "Un. Br." and the General Counsel's Answering Brief is cited as "GC Br."

GC Br. at 8-9.) In support of their position, they rely on the same distorted version of facts as is set forth in the ALJD. For example, the Union and General Counsel focus on the facts that the Hospital presented its healthcare and wellness proposals to the Union in September 2012, that the Hospital had the temerity to share its proposals with represented employees, that the Hospital expressed a desire to maintain parity between union and non-union benefits, and that the Hospital allegedly paid insufficient attention to the Union's literally last-minute counteroffer. (Un. Br. at 16; GC Br. at 9-10.) In its Exceptions, the Hospital provided ample legal support that none of these events, on their own or collectively, rise to the level of a *fait accompli*.[2] Neither the Union nor the General Counsel have offered any case law to the contrary, and therefore have not met their burden of proving a *fait accompli*. This simply invites reversible legal error. *See NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 874, 884 (9th Cir. 1978), (declining to enforce the Board's order finding the employer violated Section 8(a)(5) of the Act by engaging in hard bargaining over its economic proposals; reasoning that the employer "was not required to agree to the Union's proposals or to make concessions" and that hard bargaining "is not inconsistent with [an employer's] statutory duty to bargain in good faith."); *see also Seattle-First Nat. Bank v. NLRB*, 638 F.2d 1221, 1223 (9th Cir. 1981) (denying enforcement of the Board's order, reasoning that, "the duty to bargain in good faith does not compel either party to agree to a proposal or require the making of a concession …" and that "the Board may not, either directly

[2] *See* Memorandum ISO Exceptions at 25-33 (The Hospital did not have the requisite information, including information about the provider network, to make an informed proposal until September 20, 2012 and once the Hospital had that information it communicated its proposal to the Union the very next day; the Hospital communicated to employees only *after* it submitted its proposal to the Union, and explicitly stated it would bargain with the Union, and; the Hospital clearly explained its reasons for rejecting the Union's counterproposal).

or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.") (citations omitted).

Under the annual practice exception recognized in the *Stone Container* line of cases, an employer is privileged to change the status quo of a mandatory bargaining subject, absent overall impasse, so long as the employer "provides the union with reasonable advance notice and an opportunity to bargain about the intended change…" *Neighborhood House Assoc.*, 347 NLRB 553, 554 (2006). This exception "provides a bargaining bridge to cross the transitional period when an employer must deal with that event while engaged in initial negotiations with a newly-recognized or certified union. The principle has no broad application or disruptive potential." *TXU Electric Co.*, 343 NLRB 1404, 1407 (2004). *Stone Container* and the subsequent body of law permit employers in certain circumstances to maintain the status quo or to reject it, *i.e.*, the employer may continue to make changes pursuant to an annual practice during initial contract negotiations. Here, the Hospital elected to lawfully change the status quo pursuant to its annual practice of assessing and modifying health benefits.

Both the Union and the General Counsel unduly focus on whether and to what extent the Hospital or some external body had control over the health benefits and wellness plan. (Un. Br. at 18; GC Br. at 12, n. 12.) This is simply a distinction without a difference. The annual practice doctrine does not require that external factors be in play at all, and to impose such a requirement — as the Union and General Counsel would have the Board do here — is contrary to the law. Indeed, in *Stone Container*, the employer was under no obligation to any third parties to make annual adjustments to wages, either at all or at any specific time; that was simply its practice. In *St. Mary's* the employer was permitted to unilaterally implement changes to healthcare where

"the parties were negotiating for a first contract, but had not reached agreement on health coverage *by the time the changes at issue would normally have been implemented*." *St. Mary's*, supra, 346 NLRB at 776 (2006) (emphasis added). Under this rule, whether it was possible for the Hospital to extend open enrollment or postpone implementation is beside the point because (as the parties have stipulated) the Hospital followed its annual practice, which included conducting open enrollment in November and implementing health plan changes the following January.

In any event, both the General Counsel and the Union ignore — as did the ALJD — that there was in fact an objective and arguably "external" impetus to the Hospital's health plan proposal: a certain increase in premiums charged to the Medical Center beginning January 1, 2013 if no changes were made to existing benefits. The Hospital's spokesperson specifically testified to this eventuality, and the premium information for 2012 and 2013 (showing premium increases of approximately $1,000 per employee, and in some cases more) are in the record. Tr. 199:18-200:13, Jt. Ex. 13.[3]

Indeed, the rule apparently proposed by the General Counsel and Union here — that *Stone Container* continues to apply to wage increases, but that benefit changes can only be bargained if somehow "forced" by an external calamity such as the cancellation of all employees' health insurance — is not only illogical, but confers a significant and unwarranted

[3] For example, the 2012 premium rate for a full-time employee enrolled in the EPO Plus plan was $7,149.24. The 2013 premium rate for a full-time employee enrolled in the EPO Plus plan was $8,247, an increase of $1,097.76. *See* Jt. Ex. 13. Similarly, the 2012 premium rate for a full-time employee and family enrolled in the EPO Plus plan was $22,305.12. The 2013 premium rate for a full-time employee and family enrolled in the PPO Plus plan was $26,884, an increase of $4,578.88.

advantage on unions. Thus, employers are apparently required to continue, absent negotiation, all *beneficial* practices (such as pay increases and annual bonuses), but employers' hands are to be completely tied whenever a change might require employees to "share the pain," as with rising health costs. This runs completely counter to the logic of the *Stone Container* line of cases, which seek to preserve a (dynamic) status quo, rather than to give either party the power to "freeze" benefits pending negotiations. *See Neighborhood House Assoc.*, supra, 347 NLRB 553 at 554 (the *Stone Container* exception permits employers to lawfully alter the status quo of a mandatory bargaining subject, even without reaching impasse).

B. The Hospital Met Its Obligation To Provide Notice And A Reasonable Opportunity To Bargain, But The Union Did Not Take Advantage Of That Opportunity.

Under *Stone Container*, this case is simply about whether the Hospital provided the Union with notice and a reasonable opportunity to bargain. The law is clear: The Hospital was required to provide advance notice of and an opportunity to bargain over a proposal that was not a *fait accompli*. Thereafter, it is up to the Union to make the most of its opportunity to bargain. The Board has interpreted *Stone Container* broadly, holding that,

> [W]here, as here, a discrete event occurs every year at a given time, and negotiations for a first contract will be ongoing at that time, an employer can announce in advance that it plans to make changes as to that event. The employer's bargaining position may be to continue the practice for that year, to modify it, or to delete it for that year. As long as the union is given notice and an opportunity to bargain as to those matters, the employer can carry out the changes even if there is no overall impasse at the time of the change.

TXU Electric Co., supra, 343 NLRB 1404 at 1407 (citations omitted).

In its Exceptions, the Hospital already set forth ample evidence and law proving that its proposal was not a *fait accompli* and that the Union had sufficient notice and opportunity to bargain. The General Counsel and Union nonetheless maintain, without basis, that the Union was not afforded notice and an opportunity to bargain in this case. (GC Brief at 13; Un. Brief at 9.) They fail to understand, however, that the Hospital's obligation to provide notice and an opportunity to bargain must consider the totality of the circumstances, and cannot be measured by the intervening weeks or the number of proposals exchanged at the table. If that were the case, the Union could always stall by demanding more time or yet another exchange of proposals, which is what happened here. *See, e.g., NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1036 (10th Cir. 1996) (observing that there is no "bright line rule as to what constitutes adequate notice" but that instead the issue often "turn[s] on whether the employer refused to bargain rather than the amount of prior notice.") (citations omitted).

What in fact is determinative is what a union chooses to accomplish with its opportunity to bargain. In *Finch, Pruyn & Company, Inc.*, 349 NLRB 270, 275 (2007), for example, the Board held that an employer did not violate the act after it unilaterally entered into a subcontract following a strike, because — despite providing the union with notice and approximately a month during which bargaining was possible — "the Union simply did not take" that opportunity. Similarly, in *Lenz & Riecker*, 340 NLRB 143, 145 (2003), the Board reaffirmed the principle that, once an employer provides notice and an opportunity to bargain, there can be no failure-to-bargain violation where the union fails to take advantage that opportunity. And, in *Kaumagraph Corp.*, 316 NLRB 793, 802 (1995), the Board held the employer did not violate Section 8(a)(5) of the Act where it notified the union and thereafter bargained over the effects of

a layoff and plant closure, but the union "offered little help in resolving Respondent's problems." In these cases, the Board did not focus its analysis on the lapse of time between notice and implementation, but instead looked to the parties' overall bargaining conduct, including the steps the Union took to engage in bargaining. Here, the overall conduct of the Hospital was consistent with its legal obligation, while the Union's conduct was not.

Both the General Counsel and the Union make much of the fact that the Union was allegedly unaware that the Hospital had an annual practice of reviewing and making changes to its health benefits and wellness plans each fall. (GC Brief at 9; Un. Brief at 16). However, whether the Union was aware of the Hospital's past practice is immaterial, so long as the Union had notice and an opportunity to bargain, which it did. *See Alltel Kentucky, Inc.*, 326 NLRB 1350 (1998). In that case, "the Charging Party assert[ed] that Union Negotiator Dearing had no knowledge that the Respondent had a practice of annual wage increases […]". *Id.* at 1350. The Board observed, "it is irrelevant that the Respondent made no concurrent reference to its prior practice or that the Union may not otherwise have been apprised of such practice. Having been notified of the Respondent's decision to grant no wage increase, it was incumbent upon the Union to request bargaining over that decision." *Id.* (citations omitted). Thus, whether the Hospital did or did not tell the Union that it had an annual past practice of assessing its health care benefits is, simply put, a red herring. It bears no weight as to whether the Hospital met its burden of providing notice and an opportunity to bargain. Once the Hospital notified the Union of its proposal, the ball was in the Union's court, to dribble or drop as it saw fit.

Here, the Hospital did exactly what it was supposed to do — it notified the Union that it wanted to make changes to the current health benefits and wellness plan, and then it met with the

Union, repeatedly, to discuss its proposed changes, answer the Union's questions, and provide information to assist the Union. The Union, however, dropped the ball, and finally submitted its counterproposal only six days before open enrollment. Although the Hospital considered the Union's proposal, it was not convinced that the proposal was better. The Board in *TXU Electric Co.*, supra, summed up the Hospital's dilemma when it observed in that case,

> [t]he date for annual review and possible wage adjustment was approaching. Absent a contract on that date, the Respondent had to do *something* with respect to the matter. It could not wait for overall impasse.

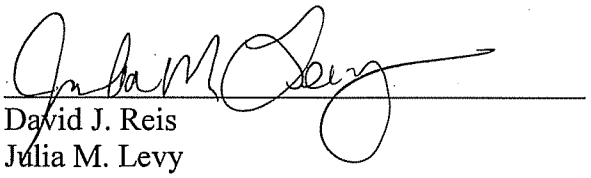
343 NLRB 1404 at 1407 (emphasis in original). (And, notably, the employer was privileged to believe it had "to do something" even though it was under no third-party obligations in that regard, contrary to the position now urged by the General Counsel.) The annual deadline for open enrollment was fast approaching and — after reviewing the Union's counterproposal — it was abundantly clear to the Hospital that the parties could not reach consensus by that time. Faced with the choice of implementing its proposal or the Union's, or with doing nothing, the Hospital chose to move forward with its own proposal, as permitted by law. The Hospital's overall bargaining conduct was clearly in good faith and it cannot be faulted if, after passing the ball to the Union, the Union clutched it tightly and let the clock run.

III. CONCLUSION

In light of the foregoing, and for the reasons set forth in Respondent's Exceptions and Memorandum in Support thereof, the Hospital respectfully requests that the Administrative Law Judge's Decision be reversed and that the Complaint be dismissed in its entirety.

Dated: June 5, 2014

Respectfully submitted,



David J. Reis
Julia M. Levy

ARNOLD & PORTER, LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024

Attorneys for Employer
SUTTER CENTRAL VALLEY HOSPITALS d/b/a SUTTER TRACY COMMUNITY HOSPITAL (incorrectly named herein as "SUTTER HEALTH CENTRAL VALLEY REGION")